

National Minimum Wage and the National Living Wage: How does it impact your business?

Could you inadvertently be paying your employees less than the national minimum wage (NMW)? There are many complications within the NMW regulations which employers may not be fully aware of. Whilst you may believe that you are paying above the current NMW rates, it could possibly be that you are not.

What is the National Minimum Wage and the National Living Wage?

The NMW is the minimum pay per hour that most workers are entitled to by law. The rate will depend on the worker's age and whether or not they are an apprentice. To receive the NMW rate the worker has to be at least school leaving age.

The national living wage (NLW) came into force from 1 April 2016 and applies to those workers who are aged 25 and over. The NLW rate is higher than the NMW rate. For those workers under the age of 25, the NMW rates for 24 years old and under still apply. For the remainder of this factsheet NMW also covers the NLW where appropriate.

The NLW should not be confused with 'The Living Wage' (LW). The LW is not enforceable by law but is independently calculated by the Living Wage Foundation and is higher than the NLW. In addition, employers can choose whether or not they wish to pay the LW, as it is on a voluntary basis.

What is a worker?

A worker for NMW is defined as someone who has entered into, or works, or has worked under:

- A contract of employment, or
- Any contract (oral, written or implied) by which the individual undertakes to perform work or services personally for someone else. However this does not apply where that individual is genuinely working on a self-employed basis. Self-employed individuals are not entitled to the NMW.

The definition of a worker also includes part-time workers, workers on short-term contracts, agricultural workers and casual

workers. Particular attention needs to be given to volunteers and voluntary workers - these are two separate categories. In general terms volunteers do not qualify for the NMW and neither do voluntary workers, providing they meet certain criteria.

There are also special provisions that cover other roles such as company directors, home workers, agency workers, interns, childcare sector and charity workers to name but a few. If you have any doubts/queries as to whether an individual is a 'worker' for the purposes of the minimum wage legislation it is very important that this is addressed at the outset of the engagement.

Types of work

The NMW is calculated at an hourly rate. Therefore regardless of how the worker is paid you still have to work out the equivalent hourly rate to check that you are paying at least the appropriate NMW rate.

The hours that must be paid for NMW depends on the type of work the worker undertakes. There are four different types of work - these are:

- **Time work** - where a worker is paid according to the amount of time/hours they work
- **Salaried hours work** - where a worker is paid an annual salary in equal weekly or monthly amounts or paid a set basic number of hours each year under their contract
- **Output work** - where a worker is paid according to the amount of work they produce, and
- **Unmeasured work** - where a worker has specific tasks to be carried out, but does not have regular hours of work.

What counts as pay for NMW purposes?

This is unfortunately not necessarily a straightforward process because for NMW purposes a worker's pay has to be calculated in a particular way. Not taking account of the correct elements that need to be considered when working out the NMW can result in a potential underpayment, so care must be taken when looking at your calculation.

Common areas where mistakes can be made:

- Deposits deducted from workers towards uniforms, accommodation keys, damage deposits etc
- Overtime, weekend or night shift rates which are higher than the worker's standard rate
- Accommodation offset provisions
- Deductions for meals or transport provided
- Travelling time
- Training time
- Time off in lieu
- Sleeping between duties
- On-call time
- Benefits in kind
- Tips, gratuities and service charges
- Workers' birthdays - checking that rate changes have been applied

Getting this wrong can have a significant impact on a business both from a reputational point of view and financially.

What happens when mistakes are made?

If a worker believes that they have not been paid the appropriate NMW rate they can look to approach the employer direct to

resolve the matter informally. Alternatively the worker can make a formal complaint direct to HMRC and if this happens HMRC will investigate the complaint.

It is also worth noting that HMRC, in addition to investigating complaints, can also carry out checks on employers to make sure that they are complying with their obligations under the NMW legislation and that workers are being paid what they legally are entitled to.

What happens if arrears are identified?

As part of the compliance check HMRC will advise you of any arrears it has identified, this will be via a notice of underpayment (NOU). This will tell you how much you owe each worker and when you must pay the applicable arrears to those workers. The notice will also provide details of the penalty considered due and when this needs to be paid to HMRC.

Penalties are calculated according to a percentage of the underpayments as detailed on the NOU. There are different percentages relating to the relevant pay reference periods. For pay reference periods starting on or after 1 April 2016 the penalty is 200% of the underpayment for each worker, with a minimum charge of £100 per notice and a maximum charge of £20,000 per worker.

Naming and Shaming of employers who break NMW law

Where HMRC establishes that an employer has failed to pay a worker at the NMW rate, even where it was unintentional, then the employer will be automatically named under the Department for Business, Innovation and Skills NMW naming scheme. This involves publishing the name of the employer, the number of workers and the amount of the underpayment.

How can we help?

We can provide you with health checks on NMW matters, reviewing your systems and records ensuring that those records are robust enough to identify potential areas where NMW issues could arise, to help you be compliant in a very heavily policed and highly regulated area of employer compliance.

Contact details

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